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Appellant:	Jeffrey M. LaFortune	Docket No.:	19,457
Serial No.:	10/747,924	Group:	1771
Confirmation No:	7068	Examiner:	Matthew D. Matzek
Filed:	December 29, 2003	Date:	June 19, 2007
For:	Surface Charge Manipulation For Improved Fluid Intake Rates of Absorbent Composites		

Appeal Brief Transmittal Letter

Mail Stop Appeal Brief - Patents
Commissioner For Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Pursuant to 37 C.F.R. 41.37, transmitted herewith is an Appeal Brief pursuant to the Notice of Appeal which was mailed on April 16, 2007.

Please charge the $500.00 fee (fee code 1402), pursuant to 37 C.F.R. 41.20(b)(2), which is due to Kimberly-Clark Worldwide, Inc. deposit account number 11-0875. Any additional prosecutional fees which are due may also be charged to deposit account number 11-0875.

Respectfully submitted,

JEFFREY M. LAFORTUNE

By: _____
Bryan R. Rosiejka
Registration No.: 55,583

CERTIFICATE OF TRANSMISSION

I, Bryan R. Rosiejka, hereby certify that on June 19, 2007 this document is being facsimile transmitted to the United States Patent and Trademark Office, Fax No. (571) 273-8300.

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Bryan R. Rosiejka

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Brief on Appeal to the Board of Patent Appeals and Interferences

Mail Stop Appeal Brief - Patents
Commissioner For Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Pursuant to 37 C.F.R. 41.37 Appellants respectfully submit this Brief in support of their Appeal of Examiner Matzek's **Final Rejection** of claims 1, 2, and 4-19 which was mailed on January 16, 2007.

On April 16, 2007, Appellants, pursuant to 37 C.F.R. 41.31 mailed a timely Notice of Appeal. The Notice of Appeal was received by the Office on April 19, 2007. Thus, the time period for filing this Brief ends on June 19, 2007.

Real Party In Interest

The present Application has been assigned to Kimberly-Clark Worldwide, Inc.

Related Appeals and Interferences

There are no related appeals and/or interferences with regard to the present Application.

Status of Claims

Claims 1, 2, and 4-34 remain in the application with claims 1, 2, and 4-19 being finally rejected. Claim 3 has been canceled. Claims 20-34 have been withdrawn. The appealed claims include 1, 2, and 4-19 and appear in the CLAIMS APPENDIX of this Brief.

Status of Amendments

There were no amendments filed after the Final Rejection with regard to the present Application.

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Summary of Claimed Subject Matter

The following concise explanation of the subject matter defined in each of the independent claims involved in the appeal refers to the page and line numbers of the Specification filed on December 29, 2003. While the following summary correlates claim elements to specific embodiments described in the application specification, it does not in any manner limit claim interpretation. Rather, the following summary is provided only to facilitate the Board's understanding of the subject matter of this appeal.

Generally, the present invention is directed to an absorbent composite exhibiting an improved fluid intake rate.

Independent claim 1 is directed to an absorbent composite that exhibits an improved fluid intake rate (e.g., page 2 lines 8-9 and page 6 lines 10-13). At least one of the components of the composite is treated to retain surface charges which create repulsive forces between that component when the composite is insulted with fluid (e.g., page 3 lines 4-16 and page 6 lines 15-26). The treatment is a coating treatment, a chemical treatment, or combination thereof (e.g., page 2 lines 35-36).

Grounds of Rejection to be Reviewed on Appeal

Ground 1

Claims 1, 2, 4-12, and 15-19 were rejected under 35 U.S.C. §103(a), as being unpatentable over U.S. Patent No. 4,604,313 issued to McFarland et al. in view of U.S. Patent No. 5,700,559 issued to Sheu et al.

Ground 2

Claims 13 and 14 were rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 4,604,313 issued to McFarland et al. in view of U.S. Patent No. 5,700,559 issued to Sheu et al., and further in view of U.S. Patent No. 5,147,343 issued to Kellenberger.

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Argument

1. Claims 1, 2, 4-12, and 15-19 are not unpatentable over U.S. Patent No. 4,604,313 issued to McFarland et al. (hereinafter "McFarland") in view of U.S. Patent No. 5,700,559 issued to Sheu et al. (hereinafter "Sheu").

The Office alleges that McFarland teaches:

> an absorbent article comprising polymeric and wood fibers (Abstract). The article comprises a first layer comprising polymeric and wood fibers, but no SAPs and at least one additional layer of the same make up as the first, except it does include SAPs. The first layer acts to aid in trapping of any super-absorbent which is not immediately entangled in the meltblown and wood fibers and prevents its passing through to the forming belt. The first layer also is the preferred body side in use as it will not be slimy and will feel drier than the super-absorbent containing side (col. 2, lines 26-48). The Example details the use of fluff cellulosic fibers. The applied invention is silent as to treatment of the components of the absorbent article to modify their charge.

(See Office Action dated January 16, 2007, pages 2-3). The Office further alleges that:

> Sheu et al. teach the process of making an absorbent article more hydrophilic by using an ionic polymeric layer with a polyelectrolyte coating upon the polymeric layer (Abstract). The hydrophilicity that is gained by treating the articles with corona discharge and plasma exposure degenerates after treatment (col. 1, lines 6-13). The process of Sheu et al. does not suffer from such limitations (col. 3, lines 18-26) and may be used in diapers to make the article hydrophilic, wettable and wickable (col. 5, lines 62-65).

(See Office Action dated January 16, 2007, page 3). The Office further alleges that "Since McFarland et al. and Sheu et al. are from the same field of endeavor, (i.e. absorbent articles) the purpose disclosed by Sheu et al. would have been recognized in the pertinent art of McFarland et al." (Office Action dated January 16, 2007, page 3). The Office then proposes that "It would have been obvious at the time the invention was made to a person having ordinary skill in the art to have coated the first layer of the McFarland et al. invention with the ionic coating of Sheu et al. The skilled artisan would have been motivated by the desire to create an absorbent article with retained wettability and wickability as described by Sheu et al." (See Office Action dated January 16, 2007, page 3).

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In order for the Office to show a prima facie case of obviousness, M.P.E.P. §2143 requires that the Office must meet three criteria: (1) the prior art references must teach or suggest all of the claim limitations; (2) there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art to combine the references, and (3) there must be some reasonable expectation of success. Applicant's respectfully submit that the Office has failed to meet its burden under at least (2) as there is no suggestion or motivation to combine McFarland with Sheu, in order to modify McFarland to arrive at applicant's recited invention.

First , it is not appropriate to engage in hindsight reconstruction. It is inappropriate to pick and choose isolated elements from various prior art references and combine them so as to yield the invention in question when such combining would not have been an obvious thing to do at the time in question. *Panduit Corporation v. Dennison Manufacturing Company*, 227 USPQ 337 (Fed. Cir. 1985).

The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification. *In re Gordon*, 733 F.2d at 902, 221 USPQ at 1127. *In re Fritch*, 23 USPQ 2nd 1780, 1783-1784 (Fed. Cir. 1992).

It is impermissible to use the claimed invention as an instruction manual or "template" to piece together the teachings of the prior art so that the claimed invention is rendered obvious. *In re Gorman*, 933 Fed. 2nd 982, 987, 18 USPQ 2d 1885, 1888 (Fed. Cir. 1991). *In re Fritch*, 23 USPQ 2nd 1780 at 1784 (Fed. Cir. 1992). One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention. *In re Fine*, 837 Fed. 2d at 1075, 5 USPQ 2d at 1600. *In re Fritch*, 23 USPQ 2nd 1780 at 1784 (Fed. Cir. 1992).

It is also well established that a prior art reference must be evaluated as an entirety and that the prior art must be evaluated as a whole. *W.L. Gore and Associates, Inc. v. Garlock, Inc.*, 220 USPQ 303 (Fed. Cir. 1983). Where neither any reference considered in its entirety, nor the prior art as a whole, suggests the combination claimed, the invention is non-obvious. *Fromson v. Advance Offset Plate, Inc.*, 225 USPQ 26 (Fed. Cir. 1985).

Second, applicant respectfully submits that McFarland and Sheu are nonanalogous art (i.e., not in the same field of endeavor) as otherwise proposed by the Office. The present invention is directed to an absorbent composite that exhibits an improved fluid intake rate, where at least one component of the composite is treated to retain surface charges which create repulsive forces between the at least one component upon fluid insult of the composite, and where the treatment is a coating treatment, a

chemical treatment, or combination thereof. The Specification discloses that the absorbent composite can be utilized in absorbent articles including, but not limited to, feminine care pads, interlabial products, tampons, diapers, incontinence articles, training pants, bed pads, sweat absorbing pads, shoe pads, bandages, helmet liners and wipes (Specification, page 7 lines 8-11).

In comparison, McFarland is directed to a superabsorbent containing nonwoven fibrous material that does not present a slimy surface when wet, and can be used as a dressing or incontinent product (McFarland, column 2 lines 18-21 and column 2 lines 58-62). However, in contrast to McFarland (and the present invention), a closer review of Sheu reveals that Sheu is not directed to an absorbent article in the sense of the present invention and McFarland. Indeed, Sheu is directed to plastic/polymer types of materials that are predominently hydrophobic (Sheu, column 1 lines 6-7). The primary purpose of the Sheu invention is to improve the wettability of these hydrophobic materials. (Sheu, column 1 lines 6-7, and column 2 line 61 – column 3 line 3). Examples of articles contemplated by Sheu include: matrices in pH test strips, ELISA assays, glucose test strips and HCG pregnancy dip sticks, soft and hard contact lenses, intraocular lenses, forcepts, retractors, filters, osmosis and reverse osmosis membranes, dialysis membranes, artificial skins, catheters, segments of artificial bone, joints or cartilage, glass beakers, and plastic petri dishes ((Sheu, column 5 lines 7-9 and lines 38-52). One of ordinary skill in the art would clearly recognize that these are not absorbent articles in the sense of the present invention or in the sense of McFarland. In fact, Sheu teaches away from an article being absorbent since, for example, a user would not desire an intraocular lense, a forcepts, a filter, an artificial bone or an glass beaker to absorb fluid, as this would frustrate the intended use of the article.

The Office contends that the invention of Sheu can be used in diapers to make the article hydrophilic, wettable and wickable. (See Office Action dated January 16, 2007, page 3 citing Sheu, column 5 lines 62-65). However, a closer review of Sheu reveals that the disclosure of Sheu at this citation is directed to a liner, not an absorbent composite. Sheu further discloses that the invention can additionally be used for other liners as well (Sheu, column 5 lines 63-65). Thus, the invention of Sheu is directed to a hydrophobic liner that can be made wettable by the process of Sheu, not to an absorbent article.

Third, the present invention is directed to an absorbent composite that is already wettable prior to treating at least one component. For example, the Specification discloses that fibers suitable for the present invention are hydrophilic (Specfication, page 7 line 27 – page 8 line 10). As a result, absorbent articles of the present invention are also wettable, even without treatment of at least one component of the absorbent composite. Thus, there would be no motivation to utilize a reference, such as Sheu, which teaches a process to make a hydrophobic item wettable.

In comparison, McFarland also discloses the use of cellulosic fiber in its invention (e.g., McFarland column 2 lines 32-34). Thus, the invention of McFarland would also be naturally hydrophilic (i.e., wettable) prior to any treatments. However, in contrast, as discussed above, the article of Sheu is directed to a substrate that is naturally hydrophobic and is then made hydrophilic via the process of Sheu. Therefore, one of ordinary skill in the art would certainly not be motivated to combine or modify an item that is already wettable with a reference that teaches making an item that is hydrophobic to be wettable.

Fourth, the Office acknowledges in several instances that the purpose of Sheu is to make items hydrophilic, wettable and wickable (see e.g., See Office Action dated January 16, 2007, page 3). However, it is well understood in the art that the properties of hydrophilicity, wettability and wickability do not equate to improved fluid intake as claimed in applicant's invention, and the Office has not provided any evidence in the record to prove otherwise. Therefore, one of ordinary skill in the art would not be motivated to utilize a reference which teaches the properties of hydrophilicity, wettability and wickability in order to improve the intake rate of an absorbent composite as desired in claim 1 of the present invention.

Summarizing, one of ordinary skill in the art would not be motivated to combine or modify the teaching of McFarland with the teaching Sheu to obtain applicant's invention. An obviousness determination is not the result of a rigid formula disassociated from the consideration of the facts of the case. The common sense of those skilled in the art can demonstrate why some combinations would have been obvious where others would not.[1] As noted in M.P.E.P. §2142, in establishing obviousness, the mere fact that the references can be combined to arrive at the claimed subject matter does not render the resultant combination obvious, unless the prior art also suggests the desirability of the combination. *In re Mill*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990). *In re Mill*, 916 F.2d 680, 16 USPQ2d 1430 (Fed. Cir. 1990). As recently set forth by the *Supreme Court in KSR International Co. v. Teleflex, Inc., et al.*, the reason to combine the elements of the prior art in the claimed fashion must be apparent to one skilled in the art.[2] A close reading of the cited references clearly indicates that the combination of claimed elements would not have been apparent to one skilled in the art without applicant's disclosure as a blueprint (which the Office had the benefit of utilizing).[3] The Office has

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[1] *Leapfrog Enterprises, Inc. v. Fisher-Price, Inc.*, No. 06-1402 (Fed. Cir. May 9, 2007) *See also KSR Int'l Co. v. Teleflex, Inc., et al.* 127 S.Ct. 1727 at 1731 (2007).

[2] *Id.*

[3] M.P.E.P. §2142 further provides that in order to reach a proper determination under 35 U.S.C. §103(a), the Examiner must step backward in time and into the shoes worn by the hypothetical "person of ordinary skill in the

clearly failed to meet its burden under number (2) of MPEP §2143, as there is no apparent reason for one skilled in the art to modify and/or combine the references to arrive at applicant's claim 1. It simply would not have been obvious to one skilled in the art to arrive at applicant's claimed combinations. Accordingly, the rejection of claims 1, 2, 4-12, and 15-19 as being unpatentable over McFarland, in view of Sheu, should be **reversed.**

2. Claims 13 and 14 are not unpatentable over McFarland in view of Sheu, and further in view of U.S. Patent No. 5,147,343 issued to Kellenberger (hereinafter "Kellenberger").

Because the underlying independent claim 1 is patentable for the various reasons discussed above, these respective dependent claims 13 and 14 are similarly patentable. The addition of Kellenberger does not overcome the lack of motivation by one of ordinary skill in the art to combine McFarland with Sheu. Accordingly, the rejection of this claim as unpatentable over these references and should be **reversed.**

Conclusion

For the reasons set forth in the above arguments, it is respectfully submitted that the rejections under 35 USC Section 103(a) based upon McFarland, in combination with Sheu, and then Kellenberger, should be **reversed.** It is respectfully submitted that the Final Office Action has not established a prima facie case since one of ordinary skill in the art could not properly combine the cited references. It is readily apparent that when each of the cited references is considered in its entirety and each reference is taken as a whole, each reference alone would not teach applicant's claimed invention. Only in light of applicant's present disclosure and the impermissible use of hindsight could a person of ordinary skill be directed to the significant changes and modifications needed to reconfigure the various prior taught components to arrive at applicant's claimed invention. It is, therefore, readily apparent that the invention called for by applicant's claims is patentable over the cited references.

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art" when the invention was unknown and just before it was made. Knowledge of Applicants' disclosure must be put aside in reaching this determination, yet kept in mind in order to determine the "differences." The tendency to resort to "hindsight" based upon Applicants' disclosure is often difficult to avoid due to the very nature of the examination process. However, as stated by the Federal Circuit, impermissible hindsight must be avoided and the legal conclusion must be reached on the basis of the facts gleaned from the prior art. *Grain Processing Corp. v. American-Maize-Products, Co.*, 840 F.2d 902, 904 (Fed. Cir. 1988).

Accordingly, it is respectfully submitted that claims 1, 2, and 4-19 are in allowable condition, and that the rejections in the Final Office Action should be **reversed**.

Please charge the $500.00 fee (fee code 1402), pursuant to 37 C.F.R. 41.20(b)(2), for filing this Appeal Brief to Kimberly-Clark Worldwide, Inc. deposit account number 11-0875. Any additional prosecutional fees which are due may also be charged to deposit account number 11-0875. If a fee is required for an extension of time under 27 C.F.R. 1.136 not accounted for above, such extension is requested and should also be charged to our Deposit Account.

The undersigned may be reached at: (920) 721-4405.

Respectfully submitted,

JEFFREY MARK LAFORTUNE

By: _____

Bryan R. Rosiejka
Registration No.: 55,583

CERTIFICATE OF TRANSMISSION

I, Bryan R. Rosiejka, hereby certify that on June 19, 2007 this document is being facsimile transmitted to the United States Patent and Trademark Office, Fax No. (571) 273-8300.

_____

Bryan R. Rosiejka

K-C Docket No.: 19,457
Serial No.: 10/747,924

Claims Appendix

The claims on appeal are:

1. An absorbent composite that exhibits an improved fluid intake rate, wherein at least one component of said composite is treated to retain surface charges which create repulsive forces between said at least one component upon fluid insult of said composite; wherein the treatment is a coating treatment, a chemical treatment, or combination thereof.

2. The composite of claim 1 wherein said composite comprises fluff fibers only, superabsorbent particles only, or combination thereof.

4. The composite of claim 1 wherein said treatment is the same for all components.

5. The composite of claim 1 wherein said treatment is different for all components.

6. The composite of claim 1 wherein said repulsive force is between superabsorbent particles only, fluff fibers only, superabsorbent particles and fibers, or combinations thereof.

7. The composite of claim 1 wherein said composite has an increased void volume.

8. The composite of claim 1 wherein said composite has increased flow channels.

9. The composite of claim 1 wherein said composite has an increased permeability.

10. The composite of claim 1 wherein said composite has an increased swelling thickness.

11. The composite of claim 1 wherein said composite comprises at least one type of fiber having a like charge to at least one SAP within said composite that provides a desired repulsive property without treatment of said at least one type of fiber.

12. The composite of claim 1 wherein said composite comprises at least one SAP having a like charge to at least one type of fiber within said composite that provides a repulsive property without treatment of said at least one SAP.

13. The composite of claim 1 wherein said at least one component comprises superabsorbent particles in the 300 to 600 microns size range.

14. The composite of claim 1 wherein said at least one component comprises superabsorbent particles, and wherein at least 50 percent of said particles are in the 300 to 600 micron size range.

15. The composite of claim 1 wherein said at least one component having said repulsive forces is selectively segregated within said composite.

16. The composite of claim 15 wherein said at least one component is disposed in at least one discrete layer, strip, section, or combination thereof in said composite.

17. A disposable absorbent article comprising the composite of claim 1.

18. The article of claim 17 wherein said composite is selectively segregated within said article.

19. The article of claim 17 wherein said composite is in the form of at least one discrete layer, strip, section, or combination thereof in said article.

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Evidence Appendix

None.

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Related Proceedings Appendix

None.